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No. 06-

IN THE
SUPREME COURT OF THE UNITED STATES

BERNARD PENZIEN and KAREN PENZIEN,

Petitioners,

v.

VILLAGE OF CAPAC, a Michigan Municipal Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment is violated when a municipality demolishes a building without first attempting to provide notice to the owners?

2. Whether a state statute/municipal ordinance which authorizes a municipality to demolish a building without providing notice to the owners violates the Due Process Cause of the Fourteenth Amendment?

3. Whether a state statute/municipal ordinance which authorizes the placement of a demolition lien on the property tax rolls without first providing notice to the owner of the demolition violates the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the parties are set forth in the caption of the case.[1]

[1] The Michigan Department of Treasury was originally named as a party-Defendant to terminate several state tax liens that had been filed against the real estate. The State tax liens were removed on August 18, 2004, pursuant to Court Order. The State has not appealed that action and is not involved in the matter now before this Court.

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BERNARD PENZIEN and KAREN PENZIEN,

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v.

VILLAGE OF CAPAC, a Michigan Municipal Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Petitioners, Bernard Penzien and Karen Penzien (Petitioners) respectfully pray that a *Writ of Certiorari* issue to review the Opinion and Judgment of the Michigan Court of Appeals which was entered in this civil action on June 29, 2006, and which thereafter, on February 27, 2007, the Michigan Supreme Court denied Petitioners' timely Application for Leave to Appeal.

OPINIONS BELOW

The Michigan Court of Appeals issued its unpublished Opinion on June 29, 2006. The opinion is available at 2006 WL 1791630 and is reproduced in the appendix to the Petition for a Writ of Certiorari (Pet. App.

3a). The Michigan Supreme Court's Order Denying Petitioners' Application for Leave to Appeal on February 27, 2007, is reported at 477 Mich 1031 (2007), and is reproduced at Pet. App. 1a. The trial court's Order (with Opinion) Granting Respondent's Motion for Summary Disposition as to Counts II through V, dated June 14, 2004 is reproduced at Pet. App. 14a. The trial court's Order (with Opinion) Granting Petitioners' Motion for Summary Disposition as to Count I, and Quieting Title to Real Estate dated November 15, 2004, is reproduced at Pet. App. 24a.[2]

JURISDICTION

The Michigan Court of Appeals issued its Opinion on June 29, 2006. A timely Application for Leave to Appeal was filed with the Michigan Supreme Court on August 9, 2006 and denied on February 27, 2007. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES/ORDINANCES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. Amend, XIV, § 1.

The State Housing Code, MCLA 125.540, provides in relevant part:

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[2] While the trial court did grant Count I of Petitioners' state court Complaint to Quiet Title, and remove Respondent's demolition lien, the Michigan Court of Appeals, pursuant to Respondent's appeal, reversed the trial court, as such, the Dangerous Building Assessment Lien, Appendix H, remains against Petitioners' title.

"Sec. 140 (1) Notwithstanding any other provision of this act, if a building or structure is found to be a dangerous building, the enforcing agency shall issue a notice that the building or structure is a dangerous building.

"(2) The notice shall be served on the owner, agent, or lessee that is registered with the enforcing agency under section 125. If an owner, agent, or lessee is not registered under section 125, the notice shall be served on each owner of or party in interest in the building or structure in whose name the property appears on the last local tax assessment records.[3]

* * *

"(5) The notice shall be in writing and shall be served upon the person to whom the notice is directed either personally or by certified mail, return receipt requested, addressed to the owner or party in interest at the address shown on the tax records."

MCLA 125.541 provides in relevant part:

(2) If the hearing officer determines that the building or structure should be demolished, otherwise made safe, or properly maintained, the hearing officer shall so order, fixing a time in the order for the owner, agent, or lessee to comply

[3] This matter was decided on Respondent's first responsive pleadings without discovery. There is no evidence that this building was registered with the local government. Petitioners do not believe it was.

with the order. If the building is a dangerous building under section 139(j) . . . .

* * *

(4) The legislative body or the board of appeals of the city, village, or township, as applicable, shall fix a date not less than 30 days after the hearing prescribed in section 140 for a hearing on the findings and order of the hearing officer and shall give notice to the owner, agent, or lessee in the manner prescribed in section 140 of the time and place of the hearing. . . . If the legislative body or board of appeals approves or modifies the order, the legislative body shall take all necessary action to enforce the order. If the order is approved or modified, the owner, agent, or lessee shall comply with the order within 60 days after the date of the hearing under this subsection.

* * *

(6) The owner or party in interest in whose name the property appears upon the last local tax assessment records shall be notified by the assessor of the amount of the cost of the demolition, of making the building safe, or of maintaining the exterior of the building or structure or grounds adjoining the building or structure by first class mail at the address shown on the records. If the owner or party in interest fails to pay the cost within 30 days after mailing by the assessor of the notice of the amount of the cost, the city, village, or township shall have a lien for the cost incurred by the city, village, or township to bring the property into conformance with this act. The lien shall not take effect until notice of the lien has been filed or recorded as provided by law. A lien provided for in this subsection does not have priority over previously filed or recorded liens and encumbrances. The lien for the cost shall be collected and treated in the same manner as provided for property tax liens under the general property tax act, Act No. 206 of the Public Acts of 1893, being sections 211.1 and 211.157 of the Michigan Compiled Laws.

The Capac Village Ordinance regarding building enforcement/demolition provides in relevant part:

> Sec. 6-68. Notice.
>
> When the whole or any part of any building or structure is found to be in a dangerous condition, the building inspector shall issue a notice which shall specify the nature of the dangerous condition and the repair or demolition necessary to make the building or structure safe.
>
> (1) The notice shall be directed to the person in whose name the property appears on the most recent village tax assessment records.
>
> (2) The notice shall specify the time and place of a hearing before the village council at which the person to whom the notice was directed shall have the opportunity to contest the findings of the building inspector.
>
> (Ord. No. 90-3, §3, 7-16-1990)
>
> * * *
>
> (b) If it is determined by the village council that the building or structure should be repaired, demolished or otherwise made safe, it shall so order, fixing a time within which compliance must be completed.
>
> (c) A copy of the decision of the village council shall be sent by regular mail or otherwise delivered to the person to whom the original notice was sent.

(Ord. No. 90-3, §5, 7-16-1990)

* * *

Sec. 6-72 Failure to comply; lien.

If the responsible persons do not comply with the village council's decision within the time specified, the village may arrange to have the required repair, demolition or other work completed. The cost of such required repair, demolition or other work shall be a lien against the real property on which the building or structure is located and shall be assessed against such real property on the next tax roll.

(Ord. No. 90-3, §7, 7-16-1990)

Sec. 6-73. Appeal to circuit court.

A person affected by a village council decision requirement the repair, demolition or other work on a building or structure, in which such person has an interest, may appeal the decision to the circuit court by filing an action within 20 days from the date of the decision by the village council.

(Ord. No. 90-3, §8, 7-16-1990)

STATEMENT OF THE CASE

A. Nature of the Action.

The underlying event that gives rise to this action was Respondent Capac's October 23, 2003 demolition of

Petitioners' building located in Capac, Michigan and the subsequent assessment of a Dangerous Building Assessment Lien in the amount of $51,239.00 against the real estate. (Appendix H, Pet. App. 40a) On March 1, 2004, Petitioners filed a 5-count Complaint to: 1) Quiet Title; 2) damages pursuant to 42 USC 1983 and the Fifth/Fourteenth Amendments to the U.S. Constitution; 3) inverse condemnation [as to Plaintiffs' real estate]; 4) damages for violation of Plaintiffs' substantive due process rights; and 5) trespass-taking [as to Plaintiffs' real estate].

B. Facts[4]

The real estate which is the subject matter of this litigation is commonly known as 101-105 S. Main Street, Capac, Michigan, and is owned by Petitioners, husband and wife. In 1997, Petitioners entered into a land contract for the sale of the real estate and on November 11, 1998, the original land contract purchasers assigned their interest to Holmes Enterprises, Inc., a Michigan corporation.[5]

In November 1999, the building located upon the property was damaged by fire. Following the fire, Holmes proposed various methods of repairing, remodeling and refurbishing the property to Respondent Capac. After Holmes and Respondent could not resolve matters,

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[4] The facts as set forth herein were established in the state court proceedings by various affidavits and exhibits which were filed by both Petitioners and Respondent. This matter was decided by the trial court without discovery and as a result of Respondent seeking dismissal in its first responsive pleading.

[5] At the time of the execution of the original land contract, fee title to the property was held by the Bernard Penzien Trust; the Trust assigned its interest to Petitioners on April 11, 1997 through a recorded Quit Claim Deed. Petitioners thereafter proceeded to forfeit the land contract pursuant to Michigan law, [MCLA 600.5701 and on June 26, 2003, any and all rights of Holmes terminated.

Respondent Capac, pursuant to its local ordinance, (Appendix E, Pet. App. 31a) did then conduct a dangerous building hearing on or about March 18, 2002, as to whether the building should be ordered torn down.[6] It is uncontroverted that Petitioners, the fee title owners of the subject property, were never provided with notice regarding the March 18, 2002 hearing.[7]

At the March 18, 2002 hearing, it was determined by Respondent Capac that the building shall be repaired, demolished or otherwise made safe (Appendix G, Pet. App. 37a). The council further found:

> "3. The owner shall repair, demolish or make safe said or [sic] building within twenty (20) days from the date of this determination.
>
> "4. If the owner or other interested party fails to repair, demolish or otherwise make safe said building within the twenty (20) day time period, upon the recommendation of the Capac Building Inspector, the Village shall demolish said building with the cost of such demolition work to be made a lien against the real property on which the building is located and assessed against the real property on the next tax roll." (Pet. App. 38a.)

Following the determination by Respondent Capac, on April 4, 2002, Holmes Enterprises did file an action in the

---

[6] Petitioners do not have evidence of any notice which may have been provided regarding the May 18, 2002 Village meeting. Petitioners do not challenge whether it was published and/or posted on the property. Petitioners were not provided notice of the hearing.

[7] See Appendix I and J, Pet. App. 52a-53a; the separate Affidavits of Petitioners; the Opinion of the Michigan Court of Appeals (Appendix B, Pet. App. 9a-10a); and the transcript of the May 10, 2004 Motion hearing (Appendix L).

St. Clair County Circuit Court, (#D-02-0934-CZ, *Holmes* v. *Capac*) challenging Respondent Capac's decision. On September 19, 2002, a Judgment was entered in favor of Respondent Capac (Appendix M, Pet. App. 54a). Nowhere in the Judgment or Complaint are Petitioners Penzien or the "owner's" rights mentioned. Capac recorded the Judgment against the real estate. Petitioners were never made parties to the above-described St. Clair County action and were never notified of any of the hearing dates before the Court.

On or about October 23, 2002, without having provided any notice to Petitioners, Respondent Capac, through its contractors, did commence to tear down the building. Upon receiving word that the building was being torn down (Appendix I, Pet. App. 42a-45a), Petitioners did prepare on October 24, 2002, an Emergency Motion to Intervene in the Holmes Enterprises action (Appendix N); however, those pleadings were not filed with the St. Clair County clerk as the building was already down on October 24, 2002.[8]

Following the demolition, Respondent Capac, on February 19, 2003, did record a Dangerous Building Assessment Lien against the subject property in the amount of $51,239.00 (Appendix H) with the St. Clair County Register of Deeds, which is now included in Petitioners' tax bill on the property.

C. Trial Court Proceedings.

Following the filing of the state court damage suit, Respondent moved for Summary Disposition in its first responsive pleading. MCLA 2.116(C)(10). At the motion hearing, the following arguments/comments were made:

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[8] See Appendix I, Affidavit of Petitioner Bernard Penzien.

[Mr. Tamm: Attorney for Respondent Capac]

> "Mr. Penzien claims that he didn't have notice, and in particular that notice wasn't served upon him. But the Village isn't obligated to serve him with notice under the statute. We're obligated to serve the taxpayer of record, and Mr. Penzien, if the court would look to the Land Contract, required that Holmes Enterprises be the taxpayer of record.
>
> * * *
>
> "To suggest that this--he didn't know about this when it was on the front page of the newspaper and his Land Contract vendee certainly had notice and was determined to have notice, and in addition to that, your Honor, Mr. Heyboer filed a--a petition to intervene before the demolition took place. So all of these demonstrate that there was notice." (Appendix L, Pet. App. 52a-53a.)

The trial court did grant Respondent's Motion and dismissing Counts II-V, specifically finding in its written Opinion, (Appendix C, Pet App. 22a) that as notice was provided to the land contract vendee, Holmes, and as Petitioners were aware that the building had been damaged, Petitioners' due process rights were not violated. The trial court, at a subsequent hearing did grant Petitioners Summary Disposition (MCR 2.116(C)(10)) on Petitioners' request to remove the demolition lien from the tax.[9] In doing so, the

[9] The trial court's determination removing the Dangerous Building Assessment Lien was based upon procedural and priority issues under various Michigan statutes.

trial court did not address Petitioners' specific argument that MCLA 125.540 was unconstitutional.

D. Michigan Court of Appeals

As a result of the rulings by the trial court, both Petitioner and Respondent filed appeals with the Michigan Court of Appeals. The Court of Appeals affirmed the trial court's dismissal of Petitioners' damage claim, finding that Respondent's notice to Holmes, and Respondent's compliance with MCLA 125.540 and the Village Ordinance was constitutionally sufficient to protect Petitioners' due process rights. The Court of Appeals further did reverse the trial court's removal of the demolition lien. The Court of Appeals rejected Petitioners' argument that MCLA 125.540 constituted an unconstitutional due process violation.

E. Michigan Supreme Court

The Michigan Supreme Court denied Petitioners' Application for Leave to Appeal; this Petition for Issuance of a Writ of Certiorari now follows.

REASONS FOR GRANTING THE WRIT

THE OPINION OF THE MICHIGAN COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND RAISES SUBSTANTIAL QUESTIONS OF CONSTITUTIONAL LAW.

At no time whatsoever did Respondent ever attempt to provide notice to Petitioners when it conducted its March 18, 2002 Dangerous Building hearing/determination and demolished Petitioners building which resulted in a Dangerous Building Assessment Lien of $51,239.00. Respondent claims that Petitioners, the owners of the

building, were not entitled to notice and thus its actions are constitutional.

The Due Process Clause of the Fourteenth Amendment forbids a State to deprive an individual of life, liberty or property without "due process of law." U.S. Const. Amend. XIV, § 1. Due process includes the right of notice and the opportunity to be heard as a pre-condition to any proceeding/action that will adversely affect the property interest of any party and/or deprives an individual of their property. *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993); *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 800 (1983).

A. Due Process Was Not Satisfied When Petitioners' Building was Demolished Without Notice

At all times relevant to this proceeding, Petitioners had a legally protected interest in property which afforded them protection under the Due Process Clause of the Fourteenth Amendment. While Petitioners' interest in the real estate was subject to a land contract, legal title was retained by Petitioners. *Curry* v. *Curry*, 213 Mich 309 (1921); *General Electric* v. *Levine*, 50 Mich App 733 (1973). In *Dow* v. *Michigan*, 396 Mich 192 (1976), the Michigan Supreme Court held that a husband and wife's ownership of real estate is an estate by the entirety and each spouse must be provided separate notice to comply with the Due Process Clause. (396 Mich 192, footnote 10.) Clearly, Petitioners have a legally protected property interest which entitles each to notice reasonably calculated to apprise them of the dangerous building proceedings and demolition activity as a pre-condition to any action by Respondent. *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 798 (1983).[10] As

[10] As fee title holders, the fact that Petitioners have a legally protected right under the Due Process Clause should be beyond question. See

Petitioners have a legally protected property right, they are therefore entitled to those rights as determined in *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306 (1950).

In *Mullane*, this Court held that prior to an action that will affect property affected by the Due Process Clause, government must provide:

> "Notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. @ 314.

Having determined the right to notice, the issue now becomes the type and sufficiency of the notice to be provided.

It appears that notice may have been provided by Respondent to Holmes Enterprises prior to the March 18, 2002 Dangerous Building hearing by publication and/or posting. Petitioners cannot challenge the claim and they do not dispute the assertion. Regardless, this form of "notice" does not comply with the Due Process Clause. The record, however, is clear that at no time did Respondent ever even attempt to provide written notice to Petitioners.

This Court has consistently rejected as inadequate, notice by publication and/or posting where the name and address of the party to be adversely affected is reasonably ascertainable. See *New York* v. *N.Y., N.H. & H.R. Co.*, 334

Mennonite, a mortgagee had a protected property interest in real estate subject to a tax sale; *Tulsa Professional Collection Services* v. *Pope*, 485 U.S. 478 (1988), an intangible cause of action, a debt, afforded a collection agency a protected property interest, *Memphis Light, Gas & Water Div.* v. *Craft* 436 U.S. 1 (1978), right to preclude utility shut-off afforded the resident a protected property interest.

U.S. 293 (1953), (a known creditor in a bankruptcy proceeding had a due process right to be given actual notice of claim dates); *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956), (where notice by publication only in a condemnation action was inadequate, where the landowner's name was known to the city and was in an official record); *Schroeder* v. *New York City*, 371 U.S. 208 (1962), (a newspaper publication and posted notices ere inadequate to inform the property owner of condemnation proceedings when the name and address was readily ascertainable from deed records and tax rolls); *Greene* v. *Lindsey*, 456 U.S. 444 (1982), (the posting of a summons on a tenant's door at a public housing project was inadequate notice of providing notice of an eviction). Respondent has never claimed that Petitioners' names and addresses were unknown.[11] On the contrary, Respondent simply claimed Petitioners were not entitled to notice.

Petitioners' ownership interest in the property has at all times been a matter of public record. In *Mennonite*, this Court stated:

> "When a mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably

[11] It is important to note that prior to 2002, Petitioners were the designated taxpayer according to Respondent's tax records. (See Appendix K, Pet App 48a). In 2002, as a result of Holmes' recording of the land contract assignment, Respondent then changed its tax rolls. On its face, MCLA 125.541 (as well as the Village ordinance) require only notice of the dangerous building/demolition proceedings to the taxpayer of record. Ironically, it was Respondent who changed the tax rolls removing Petitioners name, based upon vendee Holmes Enterprises' recording of its assignment of land contract with the St. Clair County Register of Deeds. Prior to that time, the tax bill came to Petitioners.

> identifiable, constructive notice alone does not satisfy that mandate of *Mullane*." 462 U.S. @ 798.

Further, as Respondent itself changed the tax roll notices, Respondent would be hard pressed to claim that Petitioners' interest was unknown.

In the case at bar, the only notice provided was to Holmes, posting and possibly by publication. This Court has repeatedly approved as reasonable, notice by mailing to an individual property owner's last known address. *Dusenbery*, 534 U.S. 161, 169 (2002); *Tulsa Professional*, 485 U.S. at 490; *Mennonite*, 462 U.S. at 795, 797-98; *Greene* v. *Lindsay*, 456 U.S. 444, 455 (1982); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 13-15 (1978); *Eisen* v. *Carlisle*, 417 U.S. 156, 174-75 (1974); *Bank of Marin* v. *England*, 385 US. 99, 102 (1966); *Schroeder*, 371 U.S. at 214; *Covey* v. *Town of Somers*, 351 U.S. 141, 146-47 (1956); *Walker*, 352 U.S. at 116; *New York City* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293, 296-97 (1953). In *Mullane* itself, the Court held that "ordinary mail to the record addresses" of the affected property owners would be constitutionally sufficient. 339 U.S. at 318. In *Mennonite Board*, 462 U.S. at 798, the Court held that, unless a party is "not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*."

Respondent acknowledges that it did not give any notice to Petitioners. In fact, Respondent does not claim that Petitioners' identity and/or whereabouts were unknown. Rather, Respondent merely asserts that Petitioners were not entitled to notice as MCLA 125.540 and the Village Ordinance do not require notice, and the notice to the land contract vendee Holmes was sufficient and thus the Due Process Clause was satisfied. While notice by publication may be acceptable to persons whose whereabouts is

unknown, *Tulsa* 485 U.S. at 491; *Mennonite*, 462 U.S. at 797, it is not acceptable in the case at bar.

Respondent further asserts that as Petitioner Bernard Penzien learned on October 23, 2002 that the building was being demolished, and that Petitioners attempted to intervene in an action by Holmes on October 24, 2002, Appendix N, that Petitioners had sufficient notice to comply with Due Process. Of course, any knowledge on October 23, 2002 does not constitute notice for the March 18, 2002 hearing and, the October 23, 2002 notice was that the building was being demolished (see Appendix I). In *Mennonite*, this Court recognized the government's constitutional duty, stating: "[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation," 462 U.S. at 799.

In *Mennonite*, the Indiana tax sale statute did not require notice to a mortgage holder. This Court held that mortgagees are entitled to "notice reasonably calculated to apprise [them] of a pending tax sale" and that the statutory preclusion of mortgagees as parties to receive notice of tax sales did not relieve the State of its due process obligation to provide such notice.

> In fact, in *Mennonite*, this Court held:
> "Neither notice by publication and posting, nor mailed notice to the property owner, are means 'such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it.' *Mullane*, 339 U.S., at 315. Because they are designed primarily to attract prospective purchasers to the tax sale, publication and posting are unlikely to reach those who, although they have an interest in the property, do not make special efforts to

keep abreast of such notices. *Walker* v. *City of Hutchinson, supra*, at 116; *New York* City v. *New York, N.H. & H.R. Co., supra*, at 296; Mullane, *supra*, at 315. Notice to the property owner, who is not in privity with his creditor and who has failed to take steps necessary to preserve his own property interest, also cannot be expected to lead to actual notice to the mortgagee. Cf. *Nelson* v. *New York City*, 352 U.S. 103, 107-109 (1956). The county's use of these less reliable forms of notice is not reasonable where, as here, 'an inexpensive and efficient mechanism such as mail service is available.' *Greene* v. *Lindsey, supra*, at 455.

"Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discovery whether property taxes have not been paid and whether tax-sale proceedings are therefore likely to be initiated. In the first place, a mortgage need not involved a complex commercial transaction among knowledgeable parties, and it may well be the least sophisticated creditor whose security interest is threatened by a tax sale. More importantly, a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.

* * *

"Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether

> unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. Furthermore, a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter 'was the information which the [county] was constitutionally obliged . . . to give personally to the appellant - an obligation which the mailing of a single letter would have discharged.' *Schroeder* v. *New York City*, 371 U.S., at 214.

The Michigan Court of Appeals, in responding to this Court's ruling in *Jones* v. *Flowers*, 547 U.S. 220 (2006), stated that there was nothing to alert Respondent that it needed to provide any other notice, i.e., an unclaimed certified letter, and therefore, Respondent's notice was sufficient. The Michigan Court of Appeals' rationale is flawed for several reasons:

a. Petitioners could not alert Respondent of anything as they were not provided notice of and were unaware of the administrative hearings;

b. Respondent's duty is determined by the Due Process Clause, i.e., *Mennonite*;

c. Notice to a third party on behalf of Petitioners, i.e., Holmes, as being adequate was rejected in *Mennonite*;

d. Compliance with a statute does not equate to constitutional notice under the Due Process Clause. (See *Tulsa Professional* where, while the estate complied with the Oklahoma probate 2 month claims bar statute, as the statute was unconstitutional; *Mennonite*, no notice to mortgagees required; *Wisconsin* v.

Constantineau, no notice to a known drunkard.)

Further, in all cases where "notice" is provided by publication, one would assume that the government is not aware of a notice issue prior to the action taken against the property. The reason is the affected party has not been afforded notice reasonably calculated to apprise them of the action.

The failure of Respondent to be aware of its due process notice violation does not change Respondent's underlying obligation. One can assume that the mortgage holder in *Mennonite*; the creditors in *New York*; the collection agency in *Tulsa Professional*; the homeowners in *Walker* and *Schroeder*; the tenant in *Greene*; the homeowner in *James Daniel Good Real Property*, all failed to alert the government in advance of each action for one particular reason, they were not afforded notice. Certainly Petitioners' failure to alert Respondent of Respondent's failure to notify Petitioner of the March 18, 2002 Dangerous Building hearing does not eliminate Respondent's due process violation.

Ordinary mail is a constitutionally sufficient means of seeking to deliver notice to persons whose addresses are known. See, e.g., *Tulsa Prof'l Collection Servs.* v. *Pope*, 485 U.S. 478, 490 (1988) (probate creditor claims); *Mennonite Bd. Of Missions* v. *Adams*, 462 U.S. 791, 798 (1983) (tax sale of real property); *Walker* v. *City of Hutchison*, 352 U.S. 112, 116 (1956) (real property condemnation).[12]

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[12] If a claimant in a class action with a minimal claim is entitled to notice of the proceeding by mail, certainly so are Petitioners. See *Eisen* v. *Carlisle & Jacqueline*, 417 U.S. 156, 173 (1974); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-812 (1985)

This Court has found that posting notice at a property may be unlikely to apprise the owner of an upcoming proceeding, because such notices may be removed by children, vandals, or others before they are able to convey their message to the property's owner. See *Greene* v. *Lindsay*, 456 U.S. 444, 453-454 (1982).

In the case at bar, Petitioners were entitled to notice, which, at a minimum would be by mail. *Mennonite*. As Respondent failed to even attempt any notice to Petitioners, Respondent failed to comply with Due Process.

B. The Placement of a Dangerous Building Assessment Lien Upon Petitioners' Property, Without Notice, Violates Due Process Clause of Fourteenth Amendment

Pursuant to MCLA 125.540 and the Village Ordinance and as part of the Holmes appeal process, Appendix M, following the demolition of Petitioners' building, a dangerous building lien in the amount of $51,239.00 was recorded against the real estate. (Appendix H, Pet. App. 40a.) In fact, the lien became an assessment against the land which is subject to collection pursuant to the Michigan General Tax Act, MCLA 211.40, which, if not paid by Petitioners, will result in the loss of the property at the annual tax sale. Not only have Petitioners lost their building, they now stand to lose the land at a subsequent tax sale. The lien imposed upon Petitioners' property was the result of Petitioners' never having been provided with any notice of the proceedings before Respondent Village and/or any Court/Tribunal and the demolition of the building.

Respondent had two (2) avenues by which to proceed to rectify any dangerous building issues in this matter:

A. A Judicial action under MCLA 125.534, or

B. An administrative proceeding under MCLA 125.541.

Had Respondent acted pursuant to MCLA 125.534, Petitioners, the fee title holders, would be named parties, would be served with process, would be involved in the proceeding, and would be bound by any Judgment. Simply stated, Petitioners would be afforded Due Process protection, (See MCLA 125.534, Appendix F, Pet. App. 33a).

Through the administrative system (MCLA 125.540/ Capac Ordinance), since Respondent had changed the tax records to reflect the interest of Holmes, Petitioners were not provided notice of any proceedings. Having declared the building dangerous and ordering its demolition, not only did Respondent demolish the building without affording Petitioners with notice, a demolition lien was placed upon the property and Petitioners now face the loss of the property.

Due Process requires that a property owner be afforded notice and an opportunity for a hearing prior to a pre-judgment seizure of property. *Sniadach* v. *Family Finance Corp of Bay View*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *North Georgia Finishing, Inc.* v. *DiChem, Inc.*, 419 U.S. 601 (1975); *Connecticut* v. *Doehr*, 501 U.S. 1 (1991). While Respondent was involved in a judicial proceeding with Holmes which resulted in a judgment authorizing the demolition and tax lien, (Appendix M), Petitioners were not parties to the action.

State procedures for creating and enforcing liens against property are subject to Due Process protection afforded by the Fourteenth Amendment. *Peralta* v. *Heights Medical Center, Inc.*, 485 U.S. 80 (1988). More importantly, regardless of statutory provisions, the statute must still

comply with the Due Process Clause of the Fourteenth Amendment.

In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court stated:

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

Surely, if due process is violated where one has a default judgment entered against them without proper service of process, which judgment is thereafter recorded against real estate and the real estate is sold to satisfy the judgment; *Peralta*, or a state probate statute provides a two-month claims bar without requiring actual notice to a known creditor, *Tulsa Professional*; then to record a demolition lien against Petitioners' real estate without notice of the initial dangerous building determination and any of the subsequent proceedings equally violates due process.

As noted in *Peralta*:

> "Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of

> law would have led to the same result because he had no adequate defense upon the merits.' . . . As we observed in *Armstrong* v. *Manzo*, 380 U.S., at 552, only 'wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.' The Due Process Clause demands no less in this case."

Any statute that allows the placement of a lien upon property without first providing notice and opportunity for hearing to challenge the underlying issue is constitutionally infirm. *Mullane*, *Doehr*, *Peralta*. Respondent's compliance with a statute that does not comport with due process is not a defense. *Tulsa Professional*, *Wisconsin* v. *Constantineau*.

Your Petitioner submits that the statutory framework pursuant to MCLA 125.540 and the Village Ordinance, which allows the destruction of a structure, and thereafter, the assessment of a demolition lien, without mandating notice to the owner is unconstitutional on its face. Any statutory framework for hearings and the potential determination of the destruction/removal of a building and the assessment of the demolition costs, without the requirement of notice and opportunity to the title holder fails to meet constitutional muster.

Further, the fact that Respondent obtained a Judgment against Holmes, which authorized the lien is not binding on Petitioners. *Peralta*.

For the foregoing reasons, as the Dangerous Building Assessment Lien was obtained without notice to Petitioners, and in violation of Petitioners Due Process rights it is void and must be stricken from the record.

C. MCLA 125.540 and Capac Village Ordinance Are Unconstitutional as Applied to Petitioners

Petitioners acknowledge that Respondent did provide notice to the taxpayer of record [Holmes] pursuant to the terms and provisions of MCLA 125.540 and the Village Ordinance. In fact, both the trial court and the Michigan Court of Appeals likewise upheld Respondent's actions as Respondents complied with the State statute and the Village Ordinance. Notwithstanding Respondent's compliance, a statute/ordinance that does not require notice to the owner, (one with a legally protected interest) clearly violates the Due Process Clause of the Fourteenth Amendment, and as such, Respondent's actions are unconstitutional. *Wisconsin* v. *Constantineau.*

The provisions of MCLA 125.540 and the Village Ordinance are clear and unambiguous. The Appellate Courts of Michigan have not addressed the constitutionality of MCLA 125.540.[13] While this Court may abstain from addressing the constitutionality of a statute until the Appellate Courts of the State have addressed the issue, *Zwickler* v. *Koota*, 389 U.S. 241 (1967), where a statute is unambiguous, federal courts may then decide federal constitutional claims. *Zwickler.*

Any and all statutes and/or ordinances must comply with the Due Process Clause of the Fourteenth Amendment. *Stanley* v. *Illinois.* If a statute fails to comply with the Due Process Clause, it is unconstitutional. *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); *Halbert* v. *Michigan*,

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[13] In a dissenting Opinion, Judge Sawyer of the Michigan Court of Appeals, in *Sterling Bank & Trust* v. *City of Pontiac*, unpublished opinion. No. 249689, determined that MCLA 125.540(2) was unconstitutional as it failed to require notice to the fee title holder of record.

545 U.S. 605 (2005). *Tulsa Professional; Connecticut* v. *Doehr, Peralta.*

The defect in the statute/ordinance in the case at bar is surprisingly similar to that in *Wisconsin* v. *Constantineau.* While in *Constantineau*, the police chief, pursuant to statute, posted notices throughout the town declaring the Ms. Constantineau was a danger to the peace as an excessive drinker, the statute allowed this action. The statute did not provide for any advance notice to Ms. Constantineau prior to the police chief's conduct. Ms. Constantineau challenged the statute asserting it was unconstitutional on its face as it did not afford her with notice and opportunity to challenge the "findings" by the police chief prior to this determination and the posting of this finding throughout the town. This Court struck down the statute as being unconstitutional on its face.

MCLA 125.540 (and the Village ordinance) restrict and limit notice to the taxpayer of record. Obviously, there will be cases where the tax payer record will likewise be the owner of the property and thus, compliance with the statute will result in the appropriate due process notice being provided. In fact while Petitioners acknowledge that it may only be in limited cases where the taxpayer of record is not also the owner, the fact that the statute/ordinance does not mandate notice to the owner, constitutes a violation of Due Process on the face of the statute/ordinance. *Tulsa Professional, Wisconsin* v. *Constantineau.*

Your Petitioner submits that any statutory framework for hearings and the potential determination of the destruction/removal of a building and the assessment of the demolition costs, without the requirement of notice and opportunity to the title holder fails to meet constitutional muster. *Tulsa Professional, Wisconsin* v. *Constantineau.*

While the issue in the instant case may not be as glaring on its face as in *Constantineau*, the fact of the matter remains that any statute/ordinance which can result in the demolition of one's building and the assessment of a lien for the cost of demolition against the real estate, and which does not require written notice to the owner of the property, clearly fails to satisfy the minimum requirements under the Due Process Clause of the Fourteenth Amendment. As such, MCLA 125.540 and the Ordinance of the Village of Capac must be determined unconstitutional.[14]

CONCLUSION

The decision below should be reversed as Petitioners were deprived of their property without due process of law. Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" so that such parties may protect their interests. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In this case, it is uncontroverted that the Village of Capac provided no notice of the dangerous building hearings and/or the decision to demolish the building to Petitioners, the fee title holders. In fact, Respondent did not even attempt to provide notice. Respondent Village of Capac asserts that as its ordinance and/or the state statutes do not require notice to Petitioners, there was no due process violation. Because the Village of Capac made no effort to even attempt to provide actual notice to Petitioners, the Village violated the Fourteenth Amendment by failing to take reasonable steps to notify Petitioners of the demolition of their property.

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[14] Interestingly enough, the Michigan legislature under the Michigan Tax Forfeiture Sale Act, MCLA 211.78i requires notification to the property owner before a tax sale can occur.

Respectfully submitted,

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